Supreme Court, U.S.
FILED
MAY 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-6075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DARRYL JAMES,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether statements of a defendant which have been suppressed as the fruit of an unlawful arrest without probable cause can be used to rebut the testimony of a defense witness.

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois (J.A. 24-53) is reported at 123 Ill.2d 523, 528 N.E.2d 723. The opinion of the Appellate Court of Illinois, First District, (J.A. 17-23) is reported at 153 Ill.App.3d 131, 505 N.E.2d 1118.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on July 20, 1988. A petition for rehearing was denied on October 3, 1988. (J.A. 54) The petition for a writ of certiorari was filed on December 2, 1988, and was granted on February 21, 1989. (J.A. 55) The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Following a jury trial, petitioner Darryl James was found guilty of the murder of Geliria Boyd and the attempted murder of Delbert Collins and was sentenced to concurrent terms of 30 and 15 years. These charges arose from a shooting which occurred at approximately 11:00 p.m. on August 30, 1982. (R. 254-255) A group of eight or nine teenagers, which included Boyd and Collins, was walking home from a party on the south side of Chicago. They were approached by three other teenagers, and the shortest of the three asked if anyone had any money. When Delbert Collins made a smart remark in reply, the short boy pulled a gun and fired several shots at Collins' group. (R. 294-295, 345-349, 407-410) Collins sustained a gunshot wound in the back, and Geliria Boyd was shot in the head and died as a result of this wound. (R. 382, 414-416)

On the night of August 31, 1982, between 8:00 and 8:30 p.m., Detectives Steven Glynn and Brian Regan of the Chicago Police Department took petitioner into custody after finding him at his mother's beauty parlor sitting under a hair dryer. After placing petitioner in their car they questioned him about the color of his hair the previous day, and petitioner responded that his hair had been reddish-brown, long and combed straight back. (J.A. 10, Supp.R. 93, 99-101, 120-121) The detectives questioned petitioner again at the police station at around 10:30 p.m. At that time petitioner reiterated that his hair had been reddish-brown and combed straight back on the evening of the shooting and also stated that he had gone to the beauty parlor to have his hair dyed black and curled to change his appearance. (J.A. 10-11; Supp.R. 94-95, 124-125) While at the police station petitioner also made statements concerning the shooting. (R. 514; Supp.R. 105-106, 110-112)

Petitioner was 15 years old at the time of his arrest but a juvenile court judge granted the State's motion to prosecute him as an adult. Prior to trial petitioner moved to suppress all statements and any other evidence obtained after he was taken into custody on the ground that his warrantless arrest was effected without probable cause. (R. 609-611) Following a hearing the trial court sustained this motion, finding that the police did not have probable cause to arrest petitioner. (R. 47-60)

At petitioner's trial the State called Delbert Collins and four other members of the group present at the shooting. All five witnesses were friends and called themselves the "B Boys," and all five identified petitioner in court as the boy who fired the shots. Each witness testified that petitioner had long reddish hair worn in a slicked back "butter style" on the night of the shooting, and four of them testified that he was wearing an earring. The same four witnesses also testified that they had seen petitioner a few weeks earlier at the Bud Billikin Parade and remembered him because of his red "butter" hair style and earring. (R. 296-302; 341-343, 352; 388, 391-392; 411-412; 430-431, 433) At trial petitioner's hair was black and was worn in a natural style. When they gave descriptions of the offenders to the police immediately after the shooting, none of the witnesses said anything about the hair color or style of the person who fired the shots, (R. 329, 365, 399, 448) but two of them testified that they did mention the red hair when they spoke to detectives later on at the police station. (R. 364, 402-403)

The final witness called by the State during its case-in-chief was Detective Glynn. He testified that on the night of August 31, 1982, during his investigation of the shooting, he and his partner went to a beauty parlor called Diane's House of Beauty. While there he spoke to Diane

James, petitioner's mother, and saw petitioner under a hair dryer in the beauty parlor. (R. 486-489)

The petitioner did not testify at trial but called two witnesses in his defense. The first of these witnesses was Jewel Henderson, who was a friend of petitioner and his family.[1] (J.A. 2-3) On direct examination she testified that on August 30, 1982, she took petitioner to the high school he had been attending to pick up his transcripts and to the high school to which he was transferring to register him. At that time his hair was black and he was not wearing an earring. (J.A. 3-4) She also testified that earlier that month she watched the Bud Billikin Parade with the petitioner from a window of his mother's beauty shop. (J.A. 4-5) Finally, Ms. Henderson testified that petitioner had a reputation in the neighborhood of being a non-violent person. (J.A. 6). On cross-examination, Ms. Henderson testified that she was at petitioner's house on the night of August 30, 1982, and that petitioner arrived home sometime between 10:00 and 11:00 p.m. She stated she couldn't be more specific about the time because she wasn't wearing a watch. (J.A. 7)

After Ms. Henderson was excused, the prosecutor contended that her testimony had established an alibi and that the State should be allowed to rebut this by introducing the statement petitioner made to the police concerning the shooting. (R. 514-515) Following a lengthy colloquy, the court found that no alibi had been established and denied the State's motion. (R. 515-542; Supp.R. 9-36, 50-62) Thereafter, the State sought to introduce

[1] The second defense witness was Detective Albert Jordan who testified concerning the account of the shooting and description of the offenders that he received from three of the State's witnesses. (Supp.R. 66-89)

petitioner's suppressed statements concerning the color of his hair to rebut Ms. Henderson's testimony that petitioner's hair was black on the day of the shooting. When the trial court ruled, over petitioner's Fourth Amendment objection, that the State could do so, defense counsel requested a hearing on the voluntariness of the statements. (Supp.R. 62-65) Following a hearing at which Detectives Glynn and Regan testified, the trial court found that the petitioner's statements were voluntary (Supp.R. 128) and overruled petitioner's renewed Fourth Amendment objection to the use of the statements. (Supp.R. 128-134) Defense counsel then requested that the jury be instructed that the petitioner's statements could be considered only insofar as they reflected on the believability of Ms. Henderson, and the judge said he would do so. (Supp.R. 134)

In rebuttal, Detective Glynn was recalled by the State and testified that he arrested petitioner on August 31, 1982, and spoke to him in a squad car. At that time petitioner stated that on the evening of August 30 his hair was reddish brown, was long, and was combed straight back. (J.A. 9-10) Later that night Glynn spoke to petitioner in an interview room at the police station. Over objection, Glynn testified that he again asked petitioner about the color of his hair and the reason he was at the beauty parlor, and petitioner said that his hair was reddish brown, long and combed straight back on the evening of the shooting, and that he had gone to the beauty parlor to have his hair dyed black and curled in order to change his appearance. (J.A. 10-11)

Following Detective Glynn's testimony, when defense counsel requested the judge to instruct the jury on the purpose for which this testimony was received, the court orally instructed the jury as follows:

> It's offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red.

(J.A. 12)

In surrebuttal, petitioner's aunt testified that she saw him on August 30 and August 31, 1982, that on both days his hair was black, and that she had never seen him with red hair. (Supp.R. 149-150) The petitioner's brother also testified that petitioner's hair was black on the day he was arrested, on the day before he was arrested, and on the day of the Bud Billikin Parade. (Supp.R. 153-154)

Prior to closing arguments, defense counsel submitted two alternative written instructions stating:

> Evidence that the defendant made statements following his arrest may be considered by you only as it may affect the believability of Jewel Henderson [of witnesses]. It may not be considered by you as evidence of the commission of any of the crimes charged.

(J.A. 13) The trial court refused both instructions (Supp.R. 159, 206-207) and instead gave a pattern jury instruction concerning the limited purpose for which a witness' own prior inconsistent statements could be considered. Illinois Pattern Jury Instruction, Criminal, No. 3.11 (2nd ed. 1981). (J.A. 16)

During the State's rebuttal closing argument, the prosecutor commented on the petitioner's suppressed statements as follows:

> PROSECUTOR: Now, as I said, everybody in this room has a conscience, even Darryl has a conscience; and Darryl's conscience got to him the night he told the police that he changed his hair color. That's why—

> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled. He may argue.
>
> PROSECUTOR: He did something terrible and had to do something about it. His conscience overcame him.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.
>
> PROSECUTOR: The same way that our consciences might overcome us and cause us to act in some way that we might not ordinarily act but for that conscience. That's what happened when he told the police that he changed his hair color.
>
> * * *
>
> PROSECUTOR: This case comes to you with five eyewitnesses, an admission that he changed his color —changed the color of his hair.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.

(J.A. 14)

On appeal the Illinois Appellate Court reversed petitioner's convictions and ordered a new trial, holding that the trial court erred in admitting petitioner's tainted statements to rebut the testimony of Jewel Henderson. The appellate court observed that the decisions of this Court permitting the use of illegally obtained evidence at trial were strictly limited to the impeachment of a defendant's testimony, *Walder* v. *United States*, 347 U.S. 62 (1954), *Harris* v. *New York*, 401 U.S. 222 (1971), *Oregon* v. *Hass*, 420 U.S. 714 (1975), *United States* v. *Havens*, 446 U.S. 620 (1980) (J.A. 20), and ruled that it would not create a further exception to the exclusionary rule allow-

ing use of tainted evidence to rebut the testimony of a defense witness. The court concluded that to do so

> . . . would provide little or no deterrence against further Fourth Amendment violations and the State would be able, under the guise of impeachment, to use any illegally obtained evidence relevant to the principal issues in the case.

(J.A. 22)

The appellate court also rejected the State's alternative argument that the error in admitting the petitioner's suppressed statements was harmless. In doing so the court noted that the trial court's oral instruction that this evidence was offered to refute and rebut Jewel Henderson's testimony in effect sanctioned the substantive use of this evidence; that defense counsel's request for a further limiting instruction was refused; and that the State was allowed to make substantive use of the suppressed statements during closing argument. (J.A. 22-23)

The Illinois Supreme Court, by a 4-to-3 vote, reversed the judgment of the appellate court, holding that the petitioner's tainted statements were properly admitted to rebut the testimony of the defense witness. (J.A. 24-53) The court acknowledged that because the petitioner did not testify, the exception to the exclusionary rule it announced went beyond that sanctioned in *Walder*, *Harris*, *Hass*, and *Havens*, but concluded that it was not inconsistent with those cases and would not seriously erode the protection of the exclusionary rule. (J.A. 35-37)

The court also rejected petitioner's contentions that the jury was not properly instructed on the limited purpose for which his statements could be considered and that the prosecution used these statements as substantive evidence during its closing argument. The court held that

the refusal of the limiting instruction tendered by defense counsel did not constitute reversible error because the jury was given the pattern instruction on the use of a witness' prior inconsistent statements. While acknowledging that this instruction did not "fit the situation in this case," the court concluded that when considered with the trial court's oral instruction, the jury was informed of the limited purpose for which it could consider this evidence, and that any error or irregularity in the oral instruction was waived by petitioner's failure to object or request further instruction. (J.A. 39-40)

With respect to the State's closing argument, the court discussed only the prosecutor's assertion that: "This case comes to you with five eyewitnesses, an admission that he changed the color—changed the color of his hair." (J.A. 40) Despite the absence of any reference by the prosecutor to Jewel Henderson's testimony, the court concluded that this comment was relevant to the issue of her truthfulness and was not "wholly unwarranted," and that because it was only a passing reference any error resulting from this remark was harmless. (J.A. 40-41) The court did not mention the other, more lengthy comment cited as error by petitioner in which the prosecutor argued that the reason petitioner told the police that he changed his hair color was that he did something terrible and his conscience overcame him. (J.A. 14) The court's failure to address this use of the suppressed statements as substantive evidence of guilt was one of the points raised in petitioner's request for rehearing.

SUMMARY OF ARGUMENT

1. The use of illegally obtained statements of a defendant to rebut the testimony of a defense witness is fundamentally different from the kind of impeachment

this Court has previously sanctioned. The Fourth and Fifth Amendment exclusionary rules pose no bar to the use of illegally obtained evidence to impeach the credibility of a defendant whose testimony at trial conflicts with that evidence. *Walder* v. *United States*, 347 U.S. 62 (1954); *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 714 (1975); *United States* v. *Havens*, 446 U.S. 620 (1980). In such circumstances no substantive use is made of the impeaching evidence; the trier of fact merely decides whether the existence of the inconsistency discredits the witness.

Where a defense witness is impeached with the statement of a defendant, however, the impeaching evidence is used substantively. The trier of fact can find the witness to have been discredited only if it finds the contrary statement of the defendant to be true. The statement becomes affirmative proof of guilt just as if it had been introduced in the State's case-in-chief.

2. Extension of the impeachment exception to permit the testimony of a defense witness to be rebutted by the suppressed statement of a defendant would undermine the deterrent function of the exclusionary rule by increasing the incentive of the police to violate the Fourth Amendment. Removal of the restriction that use of tainted evidence be confined to impeachment of defendant's own testimony would increase the instances of availability of that evidence to the prosecution. The value of the evidence to the prosecution would increase as well because it could be used to affirmatively prove guilt, rather than merely to discredit the testimony of the defendant. So long as the police believe they have sufficient evidence to withstand a motion for directed finding or verdict, no incentive would exist to refrain from illegal conduct to obtain incriminating evidence.

ARGUMENT

The question presented by this case is whether statements obtained from petitioner in violation of his Fourth Amendment rights were admissible to impeach the inconsistent testimony of a witness called in his defense. In answering this question in the affirmative the Illinois Supreme Court, with three justices dissenting, relied upon the line of cases beginning with *Walder* v. *United States*, in which this Court held that the Fourth and Fifth Amendment exclusionary rules did not bar the use of illegally seized evidence, or statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), to impeach the credibility of a defendant whose testimony at trial conflicts with the illegally obtained evidence. *Walder* v. *United States*, 347 U.S. 62 (1954); *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 714 (1975); *United States* v. *Havens*, 446 U.S. 620 (1980). The majority opinion acknowledged that because the tainted statements were not used to impeach testimony of the petitioner himself, the exception to the exclusionary rule it approved went beyond that sanctioned in the above decisions of this Court but concluded that this broader exception was not inconsistent with the reasoning of those decisions. (J.A. 28-36)

In reaching this conclusion the majority opinion overlooked the fact that the nature of the impeachment process involved in this case, where illegally obtained statements are used to rebut the testimony of a defense witness, is fundamentally different from the type of impeachment sanctioned by the decisions of this Court. Point I of this brief will show that the method of impeachment employed at petitioner's trial not only permitted but was based upon the use of his statements as substantive evidence of guilt in contravention of the holdings in this

Court's impeachment exception cases. In Point II it will be shown that the affirmance of the rule announced in this case would provide police officers with a significant incentive to make investigatory arrests, thereby undermining the deterrent function of the exclusionary rule.

I. CONTRARY TO THE DECISIONS OF THIS COURT, THE ADMISSION OF PETITIONER'S SUPPRESSED STATEMENTS TO REBUT THE TESTIMONY OF A WITNESS CALLED IN HIS DEFENSE ALLOWED THE STATE TO USE THIS ILLEGALLY OBTAINED EVIDENCE AS SUBSTANTIVE PROOF OF GUILT.

This Court has on four occasions upheld the introduction of illegally obtained evidence at trial for the limited purpose of impeaching a defendant's inconsistent testimony. *Walder* v. *United States*, 347 U.S. 62 (1954) (physical evidence seized during unlawful search); *Harris* v. *New York*, 401 U.S. 222 (1971) and *Oregon* v. *Hass*, 420 U.S. 714 (1975) (statements obtained in violation of *Miranda* rule); *United States* v. *Havens*, 446 U.S. 620 (1980) (physical evidence and statement that were the fruit of an illegal search). In each of these cases the Court made clear that the tainted evidence was admissible solely to challenge the defendant's credibility and could not be used as substantive evidence of guilt, observing in each case that the jury was carefully so instructed. *Walder*, 347 U.S. at 64-65; *Harris*, 401 U.S. at 223, 225-226; *Hass*, 420 U.S. at 717, 722; *Havens*, 446 U.S. at 623, 627-628. In subsequent decisions this Court has reemphasized that its sanctioning of the use of illegally obtained evidence for impeachment purposes was predicated on the assumption that jurors will follow their instructions and will not use such evidence as substantive proof of guilt. *Richardson* v. *Marsh*, 481 U.S. 200, 206-207 (1987); *Berkemer* v. *McCarty*, 468 U.S. 420, 429 n. 9 (1984).

While this assumption has validity where unconstitutionally obtained statements are used to impeach the defendant's own testimony as was the case in *Harris*, *Hass* and *Havens*, it is wholly inapplicable to the method of impeachment used at petitioner's trial. The former situation involves impeachment by self-contradiction. Under this method of impeachment it is the inconsistency alone that serves to discredit the witness; the impeaching statement is not used assertively and the trier of fact is not asked to choose between it and the contrary testimony at trial. 3A J. Wigmore, Evidence § 1018 (Chadbourn rev. 1970). Thus, with proper limiting instructions having been given, the impeachment process in *Harris*, *Hass* and *Havens* did not involve the use of the tainted statements as substantive evidence of guilt.[2]

In contrast, the method of impeachment employed at petitioner's trial by its very nature required that the jury use his suppressed statements as substantive evidence. This case involves impeachment by contradiction under which the aim is to discredit the witness' testimony by introducing other evidence to prove that the witness was in error on a particular point. 3A J. Wigmore, Evidence § 1000 (Chadbourn rev. 1970). Unlike impeachment by self-contradiction, in this type of impeachment, "It is not the contradiction, but the truth of the contradicting assertion as opposed to the first one, that constitutes the probative end." Wigmore, *supra* § 1000 at 957.

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[2] In *Walder* v. *United States*, the impeaching evidence was not a statement but illegally seized heroin which was introduced to contradict Walder's testimony that he had never possessed narcotics. However, because the heroin had been seized two years earlier and was unrelated to the charges being tried, 347 U.S. at 62-64, the introduction of this evidence to impeach presented no risk that it would be used as evidence of guilt.

In this case the State's contradicting evidence was not the testimony of another witness, but the petitioner's suppressed statements, and Jewel Henderson's testimony concerning the color of petitioner's hair would be impeached only if the jury concluded that petitioner's contrary statements were true. In short, to be relevant at all for the purpose of impeachment in this context petitioner's tainted statements had to be used as substantive evidence of guilt, a use which is constitutionally impermissible under the decisions of this Court. *United States* v. *Havens*, 446 U.S. at 627-628.

The inherent impossibility of limiting the use of illegally obtained statements to a constitutionally permissible purpose when they are introduced to impeach a witness other than the defendant himself is demonstrated by the "limiting" instruction given by the court and the prosecution's closing arguments in this case. After the trial court ruled that the State could use petitioner's suppressed statements to impeach the testimony of Jewel Henderson, defense counsel attempted to mitigate the harm by asking for a limiting instruction on the purpose for which Detective Glynn's rebuttal testimony was received. In response to this request the trial court orally instructed the jury that:

> It's offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red.

(J.A. 12) This instruction informed the jury that petitioner's statements were introduced to impeach Ms. Henderson's testimony by proving that petitioner's hair was red. It accurately states the nature of impeachment by

contradiction and illustrates that this method of impeachment requires that the contradicting evidence be used substantively.

Finally, during its rebuttal closing argument the State abandoned any pretense that petitioner's tainted statements were to be used for any purpose other than as evidence of guilt:

> PROSECUTOR: Now, as I said, everybody in this room has a conscience, even Darryl has a conscience; and Darryl's conscience got to him the night he told the police that he changed his hair color. That's why—
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled. He may argue.
>
> PROSECUTOR: He did something terrible and had to do something about it. His conscience overcame him.
>
> DEFENSE COUNSEL: Objection.
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> THE COURT: Overruled.
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> PROSECUTOR: The same way that our consciences might overcome us and cause us to act in some way that we might not ordinarily act but for that conscience. That's what happened when he told the police that he changed his hair color.
>
> * * * *
>
> PROSECUTOR: This case comes to you with five eyewitnesses, an admission that he changed his color —changed the color of his hair.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.

(J.A. 14) In these remarks the prosecution went beyond using petitioner's statements for the improper purpose of

proof that his hair was red. The prosecutor also asserted that petitioner's statement that he had his hair dyed to change his appearance constituted evidence showing his consciousness of guilt. Thus the prosecutor did not use petitioner's statements for the limited purpose of impeachment but relied upon these illegally obtained statements as affirmative proof of guilt just as if they had been introduced as part of the State's case-in-chief.

II. AFFIRMANCE OF THE DECISION BELOW WOULD UNDERMINE THE DETERRENT FUNCTION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE BY PROVIDING THE POLICE WITH A SIGNIFICANT INCENTIVE TO MAKE ARRESTS FOR QUESTIONING IN THE ABSENCE OF PROBABLE CAUSE.

As the decisions of this Court have repeatedly stressed, the primary purpose of the exclusionary rule is to deter the police from violating the right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment. *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987); *Brown* v. *Illinois*, 422 U.S. 590, 601-603 (1975). In the oft-quoted language of *Elkins* v. *United States*, 364 U.S. 206 (1960):

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guarantee in the only effective way—by removing the incentive to disregard it.

364 U.S. at 217. Thus, in deciding whether the rule should be applied in a particular context the Court has sought to determine whether admission of illegally obtained evidence would encourage violations of the Fourth Amendment and has weighed this likelihood against the costs of exclusion to the truth-seeking goal of our legal system. *Illinois* v. *Krull*, 480 U.S. at 347; *United States* v. *Leon*, 468 U.S. 897, 906-907 (1984).

This balancing approach was employed by the Court in a series of four cases to permit the use of illegally obtained evidence for the limited purpose of impeaching the credibility of a defendant whose testimony at trial conflicted with the suppressed evidence. *Walder* v. *United States*, 347 U.S. 62 (1954); *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 714 (1975); *United States* v. *Havens*, 446 U.S. 620 (1980). This Court concluded that sufficient deterrence was provided by the exclusion of the tainted evidence from the State's case-in-chief, and that the benefits of the traditional truth-testing devices of cross-examination and impeachment ". . . should not be lost because of the speculative possibility that impermissible police conduct will be encouraged thereby." *Harris* v. *New York*, 401 U.S. at 225; *Oregon* v. *Hass*, 420 U.S. at 721-722; *United States* v. *Havens*, 446 U.S. at 626-628.

In petitioner's case a majority of the Illinois Supreme Court relied upon the above decisions to hold that statements which are the fruit of an illegal arrest may be used to rebut the inconsistent testimony of any witness called by the defense. While recognizing that such use of constitutionally tainted evidence went beyond that sanctioned by the decisions of this Court, the majority below concluded that the rule it announced would not impair the deterrent ends of the exclusionary rule. (J.A. 36-38) In reaching this conclusion the majority opinion overlooks the significant incentive which its new exception to the exclusionary rule gives to police officers to make arrests in the absence of probable cause. In view of the nature of this exception the danger that it will encourage police misconduct cannot be dismissed as a "speculative possibility."

The decision below increases the incentive to make unlawful arrests in two ways. First, it greatly expands

the situations in which statements obtained as a result of an illegal arrest may be used at trial. Prior to the decision in this case, such statements could be used only in response to a defendant's own testimony at trial. Should this decision be affirmed, in future cases the police will know that a tainted statement may be admitted if the defendant presents any evidence which conflicts with the statement. Secondly, under the rule adopted by the majority opinion below, the tainted evidence will also have greater prosecutorial value. The decisions of this Court presently permit the use of illegally obtained evidence solely for the limited purpose of impeachment. However, as addressed in Point I of petitioner's brief, when a defendant's tainted statements are introduced to rebut the testimony of a defense witness the very nature of the method of impeachment requires that the statements be used as substantive evidence of guilt.

Because of this increase in the value and possible use of tainted evidence sanctioned by the decision in this case, the fact that the evidence will not be available for the State's case-in-chief does not provide adequate deterrence. As one of the minority opinions below observed:

> Where law enforcement authorities know in advance that the only evidence against a potential defendant can only be obtained through unlawful means they may hesitate. But in any case in which the police officers can, through lawful means, acquire enough evidence to make out a case against a suspect, they will be strongly tempted to secure additional evidence illegally.

(J.A. 52) (Clark and Stamos, J.J., dissenting) In many cases, if not most, the prosecution does not require an incriminating statement from the accused to make out a prima facie case, and in such cases the inability to use the

statement as part of the State's case-in-chief will not serve as an effective deterrent.

The petitioner's case exemplifies this danger to the rights guaranteed by the Fourth Amendment. When Detectives Glynn and Regan arrested and interrogated petitioner without probable cause they were aware that there were several witnesses to the shooting, (R. 14-16) and thus knew it was unlikely that the exclusion of any statement they obtained would preclude the prosecution from making a prima facie case. In these circumstances under the decisions of this Court there would be only a limited incentive to risk losing evidence for the State's case-in-chief because a tainted statement could be used only for the purpose of impeaching the defendant's testimony. By contrast, under the decision below the incentive to make investigatory arrests would be greatly enhanced as the officers would know that any incriminating statement they obtained could also be used either to inhibit the defendant from presenting any evidence in his defense or as substantive evidence to rebut any defense testimony that was presented.

In response to petitioner's argument that the creation of a "rebuttal" exception to the exclusionary rule would seriously undermine the guarantees of the Fourth Amendment, the court below characterized its new exception as defining a very narrow area of operation. (J.A. 36) Specifically, the court held that an illegally obtained statement may only be used to rebut testimony of a defense witness that is elicited on direct examination and that is directly contrary to an assertion made in the defendant's statement; and that any part of the suppressed statement that can be characterized as a confession may not be used. (J.A. 36-37) That these

limitations will prove in practice to be illusory is demonstrated by petitioner's case itself.

The ostensible purpose for introducing petitioner's suppressed statements was to rebut Jewel Henderson's testimony that his hair was black on the day of the shooting. However, in addition to introducing petitioner's statements that his hair was reddish brown and combed straight back on the evening in question, the State was permitted to elicit his further statement that ". . . he had gone to the beauty parlor to have his hair . . . dyed black and curled in order to change his appearance." (J.A. 10-11) This latter statement went well beyond what was necessary to contradict Ms. Henderson, and in the circumstances of the case amounted to an admission of guilt, which is exactly how it was used in the prosecutor's closing argument. (J.A. 13-14)

Reported decisions reflect that on rare occasion other courts of review have been presented with a request by the government for the creation of an exception to the Fourth or Fifth Amendment exclusionary rule which would permit the use of illegally obtained evidence to rebut the testimony of defense witnesses. In the overwhelming majority of these cases the court refused to recognize an exception beyond that sanctioned by the decisions of this Court, concluding that to do so would undermine the deterrent ends of the exclusionary rule at issue. *United States* v. *Hinckley*, 672 F.2d 115, 133-134 (D.C. Cir. 1982); *State* v. *Hubbard*, 103 Wash. 2d 570, 693 P.2d 718, 721-722 (1985); *State* v. *Burnett*, 637 S.W.2d 680, 689-690 (Mo. 1982); *People* v. *Ricco*, 56 N.Y.2d 320, 437 N.E.2d 1097, 1100-1101 (1982); *People* v. *Walls*, 42 A.D.2d 575, 344 N.Y.S.2d 435, 436-437 (App.Div. 1973); *contra*, *Hendrickson* v. *State*, 290 Ark. 319, 719 S.W.2d 420, 423-424 (1986).

The conclusion of the Supreme Court of Illinois that police misconduct will not be encouraged by expansion of the impeachment exception stands in marked contrast to this weight of authority. This Court should also recognize the necessity to confine the impeachment exception to the limitations it presently sanctions in order to preserve the rights of citizens to be free from unlawful governmental intrusions.

CONCLUSION

Wherefore, petitioner prays that the judgment of the Illinois Supreme Court be reversed and the cause remanded for further proceedings.

Respectfully submitted,

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